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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-841

ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

Petitioner,

v.

JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

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Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967) 21
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ARTHUR F. QUERN, Director, Illinois Department of Public Aid and Successor in Office to JAMES L. TRAINOR,

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JOHN JORDAN, Individually and on Behalf of All Others Similarly Situated,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

1. Does this Court's prior decision reversing a federal court judgment of damages against a State based on the Eleventh Amendment constitute the "law of the case" as to relief ordering state officials to give notice to the class members of certain rights?

2. Does the Eleventh Amendment constitute a jurisdictional bar in a suit brought under 42 U.S.C. §1983 to a federal court order which neither awards damages nor purports to adjudicate the monetary liability of the State,

but rather orders state officials to send notice to members of a duly certified class of public aid recipients informing them that they may appeal, if they so desire, the denial of benefits through pre-existing state administrative remedies?

STATEMENT OF THE CASE

This case was brought by John Jordan, a needy disabled person, on behalf of a class of needy aged, blind, and disabled persons in Illinois applying for Aid to the Aged, Blind and Disabled (hereinafter "AABD"), a federal/state grant-in-aid program under the Social Security Act, 42 U.S.C. §§1381-1385 (1969). The State of Illinois chose to participate in the AABD program and to comply with the provisions of the Social Security Act and regulations promulgated thereunder. The pertinent facts for purposes of the petition are that federal regulations were promulgated requiring that (a) all applications for AABD be processed within specified maximum time periods, and (b) for those persons determined eligible whose applications were delayed in processing beyond the maximum time periods, assistance was to be provided effective as of the last day of the time period in which the application should have been processed.[1]

The director of the Illinois Department of Public Aid knew that these federal regulations were mandatory and binding, yet promulgated and enforced state regulations

[1]The maximum time limits were 30 days for the aged and blind, and 45 days for the disabled. (R. Vol. 1, Exh. A attached to Item 39 and Item 13) As of January 1, 1971, the maximum time limit for the disabled was increased to 60 days. These standards are now codified at 45 C.F.R. §206.10(a)(3)(1977).

directly contrary to the federal requirements (A. 37a-39a). The state regulations prohibited the authorization of assistance for any period prior to the month in which the application was approved.[2] Because of substantial delays in the processing of assistance applications, these regulations had the effect of reducing the amount of benefits initially received by eligible AABD applicants. In October 1970, three months prior to the filing of this suit, in a case involving a class of AFDC applicants in Illinois (*Rodriguez v. Swank*, 318 F. Supp. 289 (N.D. Ill. 1970)), these very regulations were held by a three-judge federal court to be contrary to the federal regulations and therefore were deemed "null and void." *Rodriguez v. Swank* (Judgment entered Oct. 1970, ¶7) (R. Vol. 1, Item 9, Exh. B) *aff'd mem.*, 403 U.S. 901 (1971). The state public aid officials, however, continued to apply the regulations to the aged, blind and disabled.

For example, the application of the named plaintiff, John Jordan, a mentally retarded 61-year old man, was filed in September 1970, but was not finally acted upon and approved until January 1971. Based upon the state regulations, he was granted assistance effective only as of January 1, 1971, the month in which his application was approved; he was denied AABD benefits for the months of November and December 1970 which he should have received in accordance with the federal requirement that the effective date of assistance was the last day on which his application should have been processed. His case is typical;

[2]The regulations are quoted in *Edelman v. Jordan*, 415 U.S. 651, 655 n.4 (1974). The net effect of these Illinois regulations was to create a financial disincentive to the prompt processing of applications. For every month that an application was delayed, the Department saved the expenditure of the monthly entitlement of the eligible recipient.

each member of the class was denied benefits as a result of the enforcement of the challenged state regulations.

In the prior appeal in this case, *Edelman v. Jordan*, 415 U.S. 651 (1974) (hereinafter "*Jordan I*"), this Court upheld the provisions of the final judgment of the district court declaring the state regulations contrary to federal law and therefore void under the Supremacy Clause, and the provisions requiring the state public aid officials to process all AABD applications in the future in accordance with federal requirements. However, this Court reversed the portion of the Court of Appeals' decision (472 F.2d 985 (7th Cir. 1973)) upholding the district court's order that Illinois pay all AABD benefits which had been illegally denied members of the plaintiff class. The Court remanded the cause "for further proceedings consistent with" its opinion. 415 U.S. at 678.

On remand in the trial court, the members of the plaintiff class were in the anomalous position of never having received any notice explaining the established state administrative system for appealing the denial of public aid benefits, or a notice that they had been denied benefits for the period between the last day on which their applications were required to have been acted upon and the first day of the month in which their application actually was approved. Consequently, the respondent, on behalf of the class, filed a motion seeking to require the defendant "to notify the members of the plaintiff class of their possible entitlement to retroactive benefits and their right to apply for benefits within sixty (60) days through the state's administrative procedures..." (A. 31a) Prior to ruling on the motion, the trial court ordered the parties to submit information with respect to the number of persons in the plaintiff class, the cost of notifying them, the amounts involved, and other

issues affecting the equities of sending notice. The plaintiffs filed their response to the court's inquiries (A. 34a-39a); the public aid officials submitted no response.

After full consideration of both the Eleventh Amendment and equitable issues presented by the plaintiffs' motion, the trial court ruled in favor of the plaintiff class. *Jordan v. Trainor*, 405 F. Supp. 802 (N.D. Ill. 1975). The district court reasoned that notice relief "while related to possible retroactive benefits, is clearly not an award of those benefits" and concluded that an order requiring notice of the "possibility of securing, through the state administrative apparatus, benefits illegally withheld from members of the plaintiff class . . . falls outside the area proscribed by the Supreme Court's *Edelman* opinion." *Id.* at 805. The decree entered by the trial court required the state public aid officials to mail to the members of the plaintiff class a notice of right to appeal denial of benefits (A. 54a) and the standard Illinois Department of Public Aid notice of appeal form, to be signed and returned, if so desired (A. 55a-56a).

The actual sending of the notices was stayed pending appeal, but the district court refused to stay the determination of the names, addresses and amount of benefits at issue for each member of the plaintiff class. (A. 53a) The Seventh Circuit similarly denied a motion for such a stay to the extent that such information could be produced by computer, and denied without prejudice to its renewal, a motion for stay with respect to case information that could not be produced by computer.[3]

[3]The director of the Illinois Department of Public Aid has now filed with the district court the names, addresses, and amounts of benefits denied for 80% of the plaintiff class. For the remaining 20%, the names and addresses are filed with the Court but there is no figure as to the amount of benefits at issue; for them the petitioner was unable to calculate by computer the amount of benefits at issue, and the district court ruled that a case-by-case computation did not have to be made for the purpose of indicating the amount at issue in the notice.

In an opinion written by District Judge Whelan (of the Central District of California sitting by designation), the court of appeals reversed the holding of the trial court. The panel concluded that the notice relief was contrary to the bar of the Eleventh Amendment. *Jordan v. Trainor*, 551 F.2d 152 (7th Cir. 1977). Relying on *Jordan I*, the panel interpreted the Eleventh Amendment to be "a jurisdictional bar to the exercise of federal judicial power concerning past action or inaction of a state with respect to the Aid to the Aged, Blind, or Disabled Program." *Id.* at 155.

The court of appeals on rehearing *en banc* held that the trial court's judgment and, in particular, the two notices, insofar as they may have predetermined, or purported to predetermine in any way, the liability of the petitioner, controverted the Eleventh Amendment. *Jordan v. Trainor*, 563 F.2d 873 (7th Cir. 1977). However, the *en banc* Court of Appeals held that permissible notice to the plaintiff class could be fashioned within the strictures of the Eleventh Amendment to the extent that the notices did not in any way decide or purport to decide the liability of the State but instead merely advised the members of the plaintiff class that there were available preexisting state administrative remedies in which they might contest, if they so desired, the denial of benefits in accordance with state law.[4]

In the majority opinion written by Circuit Judge Harlington Wood, the court first noted that the *Jordan I* decision held that the Eleventh Amendment barred a federal court from imposing against the State "the award of an accrued monetary liability" (415 U.S. at 664) which was indistinguishable from damages. The *en banc* decision

[4]Thus, the language regarding entitlement (Pet. Br. at 8) would not be contained in notices tailored to meet the requirements of the court of appeals *en banc* decision.

held, however, that notice relief "would not create a 'liability' against the state. Whether a liability might result would be a matter for state determination, not the federal court." 563 F.2d at 876. Further, "the parties agree that there are or may be various defenses available to defendant which could be raised in the state proceeding. The federal court would in no way be involved in any determination of whether or not past benefits were in fact due from the state." *Id.* at 875. In other words, "[a]s for the state, our decision means only that if an [administrative] appeal be filed in the future by a class member, the state may determine for itself by its own procedures whether any back payment may be due the applicant." *Id.* at 878. The majority concluded that:

> The district court rightfully curtailed the continuing breach as to the future by permanent injunction. What is now controlled by the permanent injunction and proposed modified notice are all related and a part of the whole which affected the class. We believe a modified notice as suggested by this opinion is not barred by the Eleventh Amendment."

Id. at 878.

SUMMARY OF ARGUMENT

In *Edelman v. Jordan*, 415 U.S. 651 (1974) (*Jordan I*), this Court held that the Eleventh Amendment deprives a federal court of jurisdiction to enter a judgment directly against the state treasury. This holding in *Jordan I* was supported by the historical purpose of the Eleventh Amendment to prevent federal court money judgments against the treasuries of the States. The notice relief

approved by the Court below is both factually and conceptually different from the relief reviewed in *Jordan I.* The notices will inform the members of the plaintiff class that there are existing *state* administrative remedies in which the class members potentially can challenge the denial of benefits at issue; however, the notices specifically and the judgment in general do not predetermine, or purport to predetermine, any state liability, leaving that determination solely to the state administrative and judicial processes. Such relief raises issues that were neither presented nor decided in *Jordan I.* Therefore, the doctrine of the "law of the case," which applies only to those matters previously decided, is not applicable to the issues now before the Court.

The notice relief directed at a state officer is neither a monetary judgment against the State nor an intrusion upon the integrity or legitimate activities of state government, as was the relief in *Jordan I.* The petitioner now seeks to extend *Jordan I* and contends that it shields knowing violations of federal law even where there is no monetary judgment sought against the State in federal court, and where the relief requested respects the institutions of state government. Neither the purposes of the Eleventh Amendment, nor principles of sovereign immunity or federalism embodied in the Eleventh Amendment, support the contention of the petitioner.

With the exception of money judgments against the State, there is no basis for conclusively presuming that the State as sovereign has any interest under the Eleventh Amendment or otherwise in shielding its officials from remedies to redress their illegal actions. This is particularly true where, as here, the State has adopted administrative remedies specifically for the purpose of ensuring that each public aid

recipient receives the benefits to which he is entitled. Petitioner does not seek to protect state sovereignty here; rather, he seeks to block access to state review of his illegal policies. The Eleventh Amendment does not provide such a shield for the illegal acts of state officers.

Moreover, the notice relief approved by the court below is consistent with the "principles of federalism that inform Eleventh Amendment doctrine . . . ." *Hutto v. Finney*, 46 U.S.L.W. 4817, 4820 (June 23, 1978). Petitioner does not purport to explain how the notice relief undermines the principles of federalism, nor does petitioner cite any case in which this Court has held the Eleventh Amendment to be a bar to relief against state officers where the relief was not a significant intrusion upon the integrity of state government. The notice relief at issue harmonizes the federal-state interests in the AABD program, and reserves to the state agency and state courts the ultimate determination of the state's liability.

There will be cases in which federal courts, in the exercise of their equitable powers, will decline to require notices, although finding violations of the Social Security Act by state public aid officials. But quesitons of equitable discretion are not to be confused with Eleventh Amendment jurisprudence. Nothing in the language, or intended purposes of the Eleventh Amendment, or case law, supports a blanket constitutional bar to a federal court's entry of an order requiring state officers to send notices advising class members of existing state remedies.

This conclusion is further supported by federal statutes, federal regulations, and state laws that require public aid recipients (1) to be notified in writing when denied assistance, and (2) to be informed of the opportunity for a fair hearing before the state agency to challenge any

adverse action taken against them by public aid officials. In addition, the trial court's order requiring the sending of notices to respondents falls within the purposes of Fed. R. Civ. P. 23(d)(2) to inform and protect unnamed members of the class, who in the current instance remain wholly in the dark regarding this lawsuit and how it affects them. The notice relief remedies this situation by informing them of both the court's decision, and also their rights within the state public aid administrative system.

Finally, the relief is not only permissible under the Eleventh Amendment but is wholly consistent with the principles of federalism reflected in Section 1 of the Civil Rights Act of 1871, now 42 U.S.C. §1983, which was enacted by Congress to provide an effective federal remedy for infringement of federal rights by state officers. The notice relief approved by the court below fulfills the purpose of Section 1983 by vindicating the federal rights of respondents. At the same time, such relief harmonizes considerations of federalism and comity by respecting the state's legitimate spheres of independence in the administration of its public assistance program and in the determination of its own monetary liability. To reverse the court of appeals in this case in deference to petitioner's distorted notions of state sovereignty would emasculate the remedial purposes of Section 1983.

The federalism interests expressed in the Eleventh Amendment and Section 1983, when harmonized, require sensitivity to the legitimate interests of both State and National governments, and the notice relief approved by the court below satisfies that standard. To bar such notice relief would subordinate the legitimate interests of both the State and National governments to the desire of a state official to block access to State remedies expressly designed for challenges to violations of law by state officers.

I.

THE ISSUES NOW PRESENTED TO THE COURT WERE NEITHER PRESENTED, NOR DECIDED, IN *JORDAN I* AND THEREFORE THE DOCTRINE OF THE LAW OF THE CASE IS NOT PROPERLY INVOKED.

A. *Jordan I* Foreclosed Only the Question of Whether the Federal Court Had Jurisdiction to Impose a Money Judgment Against the State.

In *Jordan I* this Court reversed "that portion of the Court of Appeals decision which affirmed the District Court's order that retroactive benefits be paid . . . ." 415 U.S. at 659. "The judgment of the Court of Appeals is therefore reversed and the cause remanded for further proceedings consistent with this opinion." *Id.* at 678. The petitioner contends that the notice relief approved by the Court of Appeals *en banc*, violates the law of the case as established in *Jordan I.* (Petitioner's Brief, hereinafter "Pet. Br.," at 14) This contention misconstrues the doctrine of the law of the case, a doctrine that simply has no application here because the notice relief unquestionably presents wholly different issues than those decided in *Jordan I.*

"[T]he 'law of the case' may not be properly invoked where the case is not the same; or where, although the case is the same, the matter now presented was not previously determined." 1B MOORE'S FEDERAL PRACTICE, ¶0.404[1] at 404-405 (2d ed. 1974). This principle was enunciated in *Re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895), a case relied upon by petitioner (Pet. Br. at 20-21),

but supportive of the respondents here. The plaintiffs in that case had originally filed a bill in equity to set aside a mortgage that a bankrupt manufacturer had made to secure debts to its former directors, and prevailed. After the Supreme Court reversed (*Sanford Fork & Tool Co. v. Howe, Brown & Co.*, 157 U.S. 312 (1895)), the plaintiffs filed a motion to amend the bill. The defendants petitioned this Court arguing a violation of the law of the case doctrine. In rejecting this argument and denying the petition, the Court stressed that its earlier opinion had not adjudicated every issue in the case, and that issues not decided could still be contested.

> If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its actions may be controlled either upon a new appeal . . . or by a writ of mandamus . . . But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only.

160 U.S. at 255-56. *Accord, Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920) (amendment of bill after the appellate court overruled the trial court's refusal to grant a demurrer). *Compare Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129 (1921), *with Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551 (1904), *with Mutual Life Ins. Co. v. Hill*, 178 U.S. 347 (1900). In each of these pairings of cases, the Court emphasizes that the law of the case refers only to the precise issues decided by the highest court; the law of the case does not, and cannot, encompass issues not presented to the court, or even issues the court might have answered, but did not.

Similarly, the principle that a lower court may not vary

the mandate of an appellate court, prevents the lower court in subsequent proceedings from reconsidering the precise issues decided on appeal, but only those issues. The mandate of the court of appeals pursuant to *Jordan I*, in relevant part, ordered "that the district court's award of retroactive benefit payments to plaintiffs is reversed . . ." Petitioner urges that this mandate precluded the district court from considering the question of "notice in any form." Pet. Br. at 18. Just as with the law of the case doctrine, the mandate bars only that which was decided, and therefore consideration of the propriety of notice relief by the court below did not violate the mandate.

> The general proposition which moved [the District] Court — that it was bound to carry the mandate of the upper court into execution and could not consider the questions which the mandate laid to rest — is undisputable . . . . But that leaves us still to consider whether the immediate issue now in controversy was disposed of in the main litigation and therefore foreclosed by the mandate. While a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues. See *Re Sanford Fork & Tool Co.*, 160 U.S. 247.

Sprague v. Ticonic National Bank, 307 U.S. 161, 168 (1939) (Frankfurter, J.).

In *Jordan I*, this Court, after stressing it was only judging the "award actually made in this case, and not one which might have been differently tailored in a different case" (415 U.S. at 665), held that the district court lacked jurisdiction to award the respondents a money judgment against the State and remanded the cause for further proceedings consistent with its opinion. This decision concerned only a direct money judgment and imposed a limitation on federal courts that the Court held was within

the traditional contours of the Eleventh Amendment bar to relief (Section II. A. *infra*).

The decision now under review does not award damages or restitution, nor any relief which compensates *per se* for the Illinois official's violation of the law. It simply would give notice to class members that, if they so desire, they may utilize preexisting state remedies to attempt to recover benefits. Those class members who choose to exercise that remedy may or may not recover, with the result dependent on the state administrative agency and the state courts. Far from violating *Jordan I*'s mandate or the law of the case, the notice relief is an outgrowth of *Jordan I* that respects the limitation articulated in *Jordan I* on the federal court's power to give full relief. The notice relief closes the case in a logical and orderly manner by providing, for the first time, notice to the class explaining the result of the action filed on their behalf and their possible remedies outside the federal forum.

B. The Notice Relief Developed on Remand is Designed to Fulfill the Requirements of Both Federal and State Law.

Under the original judgment, the members of the class (identified in paragraph 5) were to be paid all benefits which they should have received but for the enforcement of the state regulations held to be void. (A. 25a-27a)[5] On remand

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[5]Petitioners now assert that the relief granted to such class was entered on behalf of a noncertified Count II class. (Pet. Br. at 6 n.4, 9, 25, and 27) This contention was never before presented to any court reviewing this cause, and neither presented in the petition for certiorari,

(continued)

from *Jordan I*, the class members identified in paragraph 5 of the original judgment were in the position of never having received any notice whatsoever regarding the complaint, the original judgment, the Supreme Court decision, or its effect on them. Moreover, they had never received notice from the state public aid officials that they had been denied AABD benefits as a result of state regulations which had been voided by the Court in this case. These individuals were, and still remain, wholly in the dark. In this posture, on remand from *Jordan I*, respondents sought an order requiring the petitioner to notify the class members (specified in paragraph 5 of the original judgment) of the petitioner's denial of AABD benefits pursuant to regula-

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(footnote continued from preceding page)

nor in the questions presented for review. Therefore, it is not properly before this Court. Moreover, this contention is simply erroneous. Count II of the complaint sought to secure benefits from the date of application; this claim was rejected and the Count II class was never certified. Count I of the complaint challenged petitioners' failure to comply with federal law requiring benefits from the last day of the federal time standards, and the Count I class was certified. (A. 20a) In the original district court opinion, with respect to restitution of benefits, the court defined the class as

> those applicants who applied for AABD since the effective date of the regulations, July 1, 1968, and did not receive their initial check as required within the 30-day or 45-day (60 days for Aid to the Disabled as of January 1, 1971) limits.

(R. Vol. II, p. 320)

All such persons were included in paragraph 5 of the final judgment (A. 25a-26a), and in accordance with Rule 23(c)(3), this paragraph described in detail those whom the court included as class members under Count I. On remand, the district court opinion, *Jordan v. Trainor*, 405 F. Supp. at 804, and final judgment (A. 51a-53a) once again define the same class in accordance with Rule 23(c)(3). In fact, this description is sufficiently detailed so that petitioner has been able to compile lists of all class members.

tions held invalid in this case, and of their right to file a notice of appeal challenging the denial of said benefits, as in the case of any other denial of benefits. (A. 13a)

The notice relief sought by the respondent in the district court could not be secured in the Illinois state courts. Suits challenging public aid officials' failure to comply with the Social Security Act cannot be brought under Section 1983 in the state courts on behalf of a class of public aid recipients. *Chicago Welfare Rights Organization v. Weaver*, 56 Ill.2d 33 305 N.E.2d 140 (1973), *appeal dismissed, cert. denied sub nom., Chicago Welfare Rights Organization v. Edelman*, 417 U.S. 962 (1974). The exclusive remedy in Illinois, its courts have held, is for individual recipients to present their legal claim in an administrative fair hearing, and, if unsuccessful, then to seek judicial review of the administrative decision under the Illinois Administrative Review Act. Ill. Rev. Stat., ch. 110, §§264-279 (1977). *Id.* at 39, 305 N.E.2d at 143. *Accord, People ex rel. Naughton v. Swank*, 58 Ill.2d 95, 317 N.E.2d 499 (1974); *Ballew v. Edelman*, 39 Ill. App. 3d 490, 340 N.E.2d 155 (1975). *See also, Vickers v. Trainor*, 546 F.2d 739, 744-747 (7th Cir. 1976) (*Pullman*-type abstention improper where class challenged public aid officials' failure to provide certain social services to welfare recipients in violation of Social Security Act, in part because Illinois state courts will not entertain challenge by class that public aid regulations violate federal law.)

The Social Security Act, 42 U.S.C. §1382(a)(4) (1969), required that every state participating in the AABD program, including Illinois, must "provide for granting an opportunity for a fair hearing before the state agency to any individual whose claim for aid or assistance under the plan is denied or is not acted upon with reasonable promptness."

Pursuant to this statutory mandate, and the guarantees of due process (*cf. Goldberg v. Kelly*, 397 U.S. 254 (1970)), HEW promulgated regulations, now codified at 45 C.F.R. §205.10(a) (1977), requiring each state to adopt an administrative "fair hearing" procedure to afford applicants and recipients a means by which they might challenge any adverse action taken against them by state public aid officials. As a participating state, Illinois has adopted a "fair hearing"mechanism. Ill. Rev. Stat., ch. 23, §§11-6 to 11-8.7 (1977).

Under federal law, a hearing is required for any recipient "who is aggrieved by any agency action resulting in . . . reduction . . . of assistance" (45 C.F.R. §205.10(a)(5) (1977)). The corresponding state law provision guarantees applicants or recipients the right to appeal a decision "granting aid in an amount which is deemed inadequate." Ill. Rev. Stat., ch. 23, §11-8 (1977). If a recipient proves successful on his or her claim at the administrative level or if the agency "decides in favor of the claimant prior to the hearing," 45 C.F.R. §205.10(a)(18) (1977) requires the state public aid officials to "promptly make corrective payments retroactively to the date the incorrect action was taken."[6]

Although not required by the Social Security Act, Illinois (Ill. Rev. Stat., ch. 23, §11-8.7 (1977)) has conferred upon public aid recipients a right to have the hearing examiner's decisions reviewed in the state courts, pursuant to the Illinois Administrative Review Act, Ill. Rev. Stat., ch. 110,

[6]Pursuant to 45 C.F.R. §205.10(b)(2) (1977), federal financial participation is available for

> Payments of assistance made to carry out hearing decisions, or to take corrective actions after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable federal policies on corrective payments.

§§264-279 (1977). And if the Illinois courts require "corrective payments" of money from the state treasury, there is no problem of immunity, for the State has, in the exercise of its sovereign power, consented to suits in its own courts seeking such relief. *Johnson v. Dept. of Public Aid*, 3 Ill. App. 3d 1045, 279 N.E.2d 791 (1972).

This entire "fair hearing" process, however, is necessarily triggered by a written notice to the applicant or recipient. The notice describes the action taken by the Department of Public Aid with respect to the recipient's assistance grant and the availability of the administrative hearing procedure, should the recipient wish to challenge the Department's decision.[7] The notice requirement is premised upon both state and federal law. Federal law requires that: "Every applicant or recipient shall be informed in writing . . . at the time of any action affecting his claim: (i) of his right to a hearing, as provided in paragraph (a)(5) of this section; [and] (ii) of the method by which he may obtain a hearing." 45 C.F.R. §205.10(a)(3) (1977). The corresponding state law provision, Ill. Rev. Stat., ch. 23, §11-6 (1977), requires such notice and has been strictly construed by the Illinois courts to require actual written notice to applicants who, like respondents, have received benefits for a substantial period of time, but never received an official determination on all aspects of their application for assistance.

For example, in *Isabell v. Department of Public Aid*, 18 Ill. App. 3d 868, 310 N.E.2d 742 (1974), a mother and

[7]This Court emphasized just last Term the importance of notice in an analogous context, and particularly notice which informs the citizen of (1) the adverse governmental action taken or to be taken against him; and (2) the procedure available for challenging such action. *Memphis Light, Gas & Water Division v. Craft*, 98 S. Ct. 1554. (1978).

her two children applied for a grant under the Aid to Families with Dependent Children program ("AFDC"), including special allowances on account of the family's extraordinary medical needs. Although the family was awarded an AFDC grant, they were never notified of any Department decision concerning their request for special allowances. More than 60 days after they received their first AFDC check, the family filed a notice of appeal seeking administrative review concerning the special allowance request. The Department took the position that in a case of delay in acting upon an application or a part of an application, the 60-day time limit in Ill. Rev. Stat., ch. 23, §11-8, for filing administrative appeals automatically begins to run on the day after the federal time limit for processing applications expires. In the alternative, it argued that the receipt of a check in an improper reduced amount placed the applicant on constructive notice of the Department's decision. The Illinois court, however, rejected both positions, holding that the statutory limitations period for seeking administrative review and the entire hearing process could not commence until the applicant received actual written notice of the Department's decision on his or her application for benefits. "Any other construction would not only raise serious questions under Federal law, but would emasculate an applicant's right to notice under Section 11-6. . . " *Id.* at 872, 310 N.E.2d at 745. *Accord, Mann v. Dept. of Public Aid*, 31 Ill. App. 3d 430, 333 N.E.2d 233 (1975).

The order entered by the district court, as modified by the *en banc* opinion of the court of appeals, simply provides the respondent class members with the written notice required under state and federal law, and notifies respondents that they may trigger the "fair hearing" procedures.

C. The Notice Relief Developed on Remand Fulfills the Federal Court's Duty Under Fed. R. Civ. P. 23(d)(2) to Protect and Inform the Unnamed Members of the Class.

Aside from the requirements of 42 U.S.C. §1382(a)(4) (1970), the regulations promulgated thereunder at 45 C.F.R. §205.10(a) (1977), and Ill. Rev. Stat., ch. 23, §§11-6 to 11-8.7 (1977), discussed *supra*, the notices to be sent in the present case fulfill the trial court's responsibilities, under Fed. R. Civ. p. 23(d)(2), to inform the unnamed members of the class represented by respondent of the terms of the judgment which binds them, and to protect these class members by notifying them of the state administrative remedy which is available to them. Rule 23(d)(2) provides, in relevant part:

> In the conduct of actions to which this rule applies, the court may make appropriate orders:
>
> * * *
>
> (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment....[8]

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[8]The Adivsory Committee Notes to Rule 23(d)(2) point out that "[s]uch notice is not a novel conception" and indicate that Rule 23(d)(2) merely codifies the previous law that the authority to order notice is an equitable power of the court. Prior to the 1966 amendments to Rule 23, it was clearly recognized that courts had inherent equitable power to give notice to absent parties whenever they deemed it advisable to do so. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §1793 at 201 (1972); Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 328 (1973); Newberg, *Orders in the*

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The Advisory Committee Notes to Rule 23(d)(2) state:

> [The] mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject.

Professor Kaplan, a member of the Advisory Committee, states that the provision for notice under Rule 23(d)(2) "for the protection of the members of the class" and "for the fair conduct of the action" was inserted in response to Professor Chafee's admonition that class members "ought to be informed as well as represented." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of The Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 394 (1967). The complete quote from Professor Chafee indicates the basis for 23(d)(2):

> [C]ommon decency requires some sort of steps to be taken to apprise people that litigation is under way which seriously affects their life — insurance policies or other financial expectations. They ought to be informed as well as represented. They ought to have some notion of what is going on . . . representatives in a class suit can keep silent and leave completely in the dark hundreds of persons whose rights hinge on the outcome of an unknown equity suit.

(footnote continued from preceding page)

Conduct of Class Actions: A Consideration of Subdivision (d)," 10 B.C. INDUS. & COM. L. REV. 577 (1969). Thus, in *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), the district court ordered notice advising class members of their right to present individual damage claims after the jury had found for the class on the liability issue.

Z. CHAFFE, SOME PROBLEMS OF EQUITY, 230 (1950).[9] (1950).[9]

The notices to be sent in the present case serve to fulfill the mandate of Rule 23(d) by providing for the protection of the members of the class, and the fair conduct of this action. As noted in the *en banc* opinion, "What is now controlled by the permanent injunction and the proposed modified notice are all related and a part of the whole which affected the class." *Jordan v. Trainor*, 563 F.2d 873, 878 (7th Cir. 1977). The notices, as approved in the *en banc* opinion, do no more than inform the members of the plaintiff class of this suit, the fact that they have been denied benefits, and the availability of the Department's "fair hearing" procedures through which they may obtain a hearing concerning the amount of benefits denied them. Coupled with this notice is an appeal form virtually identical to the notice sent by the Department of Public Aid in every case of a denial or reduction of benefits, which, if returned to the Department of Public Aid within 60 days, would start the hearing process.

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[9]Notices under subsections (c)(2) and (d)(2) of Rule 23 have been required or suggested in a variety of contexts to protect the members of a certified class, or even members of putative classes. *Greenfield v. Villager Industries, Inc.*, 483 F.2d 824, 831-32 (3d Cir. 1973); *Doe v. General Hospital*, 434 F.2d 427, 433 (D.C. Cir. 1970); *Rothman v. Gould*, 52 F.R.D. 494, 501 (S.D.N.Y. 1971) (notice required because widespread publicity could have led potential class members "to refrain from taking on the job for themselves"); *Turoff v. Union Oil Co.*, 61 F.R.D. 51 (N.D. Ohio 1973) (Rule 23 and due process require notice to persons who may have relied on class complaint in failing to press their own claims); *cf. American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551-52 (1974) (not until "notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case").

In summary, the notice relief sanctioned by Rule 23, federal and state law, and equitable considerations, as well as the Eleventh Amendment (Section II, *infra*) and Section 1983 (Section III, *infra*) issues presented by such relief, were neither considered nor decided by this Court in *Jordan I*; therefore, contrary to the contention of the petitioner, the doctrine of the law of the case is not applicable. *See, e.g., Re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895). Accordingly, on remand from *Jordan I*, the district court, and then the court of appeals, properly considered the issues presented by respondents' motion, and to those issues we now turn.

II.

ORDERING STATE OFFICIALS TO SEND NOTICE TO THE CLASS IS NEITHER A MONETARY JUDGMENT AGAINST THE STATE NOR AN INTRUSION UPON THE INTEGRITY OR LEGITIMATE ACTIVITIES OF STATE GOVERNMENT AND THEREFORE SUCH RELIEF IS NOT BARRED BY THE ELEVENTH AMENDMENT.

A. The Principles of Sovereign Immunity Embodied in the Eleventh Amendment Support a Bar to Federal Court Awards of Money Judgments Against the States, but Not a Blanket Bar to Relief Against State Officers Who Have Deprived Persons of Federal Rights.

The historical underpinning of the Eleventh Amendment

unquestionably centers on barring the federal courts' entry of money judgments directly against the States.[10] The decision in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793), which prompted the Eleventh Amendment,[11] involved a suit to recover on a contract with the State of Georgia, and as recognized in *Parden v. Terminal Railway,* 377 U.S. 184, 187 (1964):

> [A] suit on state debt obligations without the State's consent was precisely the 'evil' against which both the Eleventh Amendment and the expanded immunity doctrine of the *Hans* case were directed. (Footnote omitted.)

In *Petty v. Tennessee - Missouri Bridge Comm'n,* 359 U.S.

[10]Other aspects of the intent of the framers of the Eleventh Amendment remain the subject of dispute, but a growing body of historical evidence is assembled in a scholarly article by Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One,* 126 U. PA. L. REV. 515 (1977), to support the following propositions, *inter alia:* (1) there was disagreement concerning the status of States' sovereign immunity among those involved in the ratification process of the Constitution, a disagreement that was not resolved when the Constitution was adopted; (2) sovereign immunity survived the Constitution as a common law requirement; and (3) when citizens sue their own States, sovereign immunity governs those cases only as a common law doctrine (*Id.* at 540 n.88). The author, while not taking issue with the holding in *Jordan I* as to damages, criticizes *Jordan I* for its treatment of historical sources. *Id.* at 529 n.54.

[11]In 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1926 ed.), it is noted that

> the real course of the attack on the *Chisholm Case* was the very concrete fear of the "numerous prosecutions that will immediately issue from the various claims of the refugees, Tories, etc. . . ." In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States.

275, 276 n.1 (1959), this Court emphasized the same point by quoting from M. IRISH and J. PROTHO, THE POLITICS OF AMERICAN DEMOCRACY 123 (1959):

> " 'When the Eleventh Amendment was proposed many states were in financial difficulties and had defaulted on their debts. The states could therefore use the new amendment not only in defense of theoretical sovereignty but also in a more practical way to forestall suits by individual creditors!' "

Chief Justice Marshall in *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821), similarly recognized the historical connection between the Eleventh Amendment and the States' financial integrity.

> It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed to Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states . . . We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited . . . were persons who might probably be . . . creditors.

Id. at 406.

In *Jordan* I this Court was confronted with the question of whether the Eleventh Amendment deprived the federal

court of jurisdiction to enter a judgment ordering payment directly from the treasury of the State of Illinois, or whether the doctrine of *Ex Parte Young,* 209 U.S. 123 (1908), encompassed a judgment for restitution of public aid benefits wrongfully withheld. The court of appeals in *Jordan v. Weaver,* 472 F.2d 985 (7th Cir. 1973), had reasoned that the imposition by a federal court of a liability against the State was not the "touchstone of the Eleventh Amendment's applicability." *Id.* at 991. The ramifications of this decision extended beyond the federal/state grant-in-aid AABD program and might have opened the door to direct monetary judgments against States in federal suits seeking recovery of taxes from state treasuries, suits for damages, and numerous other areas.

The majority in *Jordan I* concluded that the decision of the court of appeals was contrary to the rule "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." 415 U.S. at 663. The Court further observed that the decree was "in practical effect indistinguishable in many aspects from an award of damages against the State," *Id.* at 668, and emphasized that if it were to uphold the decree, it would have been necessary for the Court to overrule its holding in *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459 (1945). Unwilling to overrule *Ford Motor Co.,* and to countenance damage suits against States in federal court, the Court reversed "that portion of the Court of Appeals decision which affirmed the District Court's order that retroactive benefits be paid . . ." *Id.* at 659.

The Court stressed, however, that it was judging only "the award actually made in this case, and not one which might have been differently tailored in a different case . . . ."

Id. at 665. Further, the Court noted (*Id.* at 667):

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex Parte Young* will not in many instances be that between day and night.

The limited scope of the *Jordan I* holding is evidenced by subsequent opinions of this Court describing the case as one seeking "damages from the public treasury" (*Scheuer v. Rhodes,* 416 U.S. 232, 238 (1974)), as an "ordinary suit for money damages against the State" (*Milliken v. Bradley,* 433 U.S. 267, 279 (1977)), and as one granting "immunity from retroactive monetary relief." *Hutto v. Finney,* 46 U.S.L.W. 4817, 4820 (June 23, 1978). In short, this Court viewed the direct monetary relief in *Jordan I* as falling squarely within the core of the Eleventh Amendment's original purpose to prevent the federal courts from directly intruding upon the treasuries of the States.[12] The notice relief at issue now, however, is both conceptually and factually different from the money judgment awarded in *Jordan I.*[13]

> The form of notice we envisage would not create a 'liability' against the state. Whether a liability might result would be a matter for state determination, not the federal court. No federal judgment against the state could be created. Such a notice could not be labeled equitable restitution or be considered an award of damages against the state.

Jordan v. Trainor, 563 F.2d at 876 (*en banc*).

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[12]Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 HARV. L. REV. 682, 687 (1976) ("The operational concept of a sovereign immunity that is secure against judicial inroads has been retained in at least the core area of damage suits.")

The position now presented by the petitioner, one never before embraced by this Court, is that the Eleventh Amendment shields knowing violations of federal law by state officers even where there is no monetary relief sought against the State and where the relief requested respects the institutions of state government. In essence, the petitioner claims, citing only *Jordan I* for support, that Eleventh Amendment immunity sweeps so broadly as to bar federal courts from giving notice to class members as to the disposition of a case and the possibility of further relief through a preexisting state administrative remedy.

The difference between notice relief and a money judgment is fundamental, however, in terms of the Eleventh Amendment's historical protection of the State's fisc. The Eleventh Amendment protects the state's sovereignty by protecting the State fiscally against federal court retroactive monetary awards, thereby preventing unanticipated disruptions of the State's fiscal planning. In order to do so, the Amendment effectively creates a presumption that the State *qua* State does not relinquish this immunity except by explicit waiver - constitutional or statutory. Given this function of the Amendment, for purposes of money judgments to be paid by the State, state officials, acting in their official capacities, may claim the immunity as well,

[13] *Compare* Pub. L. No. 94-574, §1, 90 Stat. 2721 (1976), amending 5 U.S.C. §702 to provide that

> [a]n action in a court of the United States seeking *relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. (Emphasis added.)

insofar as the damage award runs against the State.

But when state officials seek to protect their own illegal actions, and to hide from persons within the State the nature of those actions, or attempt to interpose state sovereignty between injured citizens and available procedures the State *qua* State has set up as a remedy, there is no broad presumption (grounded in the Eleventh Amendment or otherwise) that the State as sovereign needs or wants immunity, even if it were available. With the exception of the money judgment, there is no basis for assuming that the sovereign has any interest in shielding its officials from remedies directed at their illegal actions, or partakes in any way in the illegal action. *See Ex Parte Young, supra.* This is just as true for the notice relief currently at issue as for the portion of the injunction affirmed in *Jordan I.* The State may or may not eventually pay benefits to those class members who choose to assert their rights in the state process. But the State has in no way indicated - and the policies of the Eleventh Amendment in no way presume on behalf of the officials here - that the State wants or is entitled to have its officials who have committed illegal acts cloaked in an immunity solely to block knowledge of and access to a state-created process. The state officials who are attempting to do so are thus wholly on their own, and have no identity with any state sovereignty which is comparable to the identity present when damages are at issue.[14]

[14] An example clarifies this. Assume that Illinois had a property tax system under which assessments were sent out, and the property owner had one year to file an administrative or judicial appeal of the assessment. Assume also that the state assessor notified one group of property owners (*e.g.*, whites) of the appeal right but not another group (*e.g.*, blacks). A federal lawsuit could certainly enjoin that official from such discriminatory practices in future years. On the other hand, the Eleventh Amendment tax cases (see pp. 38-39. *infra*) would presumptively cloak

(continued)

Indeed, insofar as the petitioner contends that notice relief is tantamount to a damage award (Pet. Br. 33-34) he is making no useful statements about the nature of the federal court order, which does not award damages; rather, such statements merely indicate his total isolation from the State's own policies and expressions of the scope of its sovereignty, and the remedies it provides for its residents, and underline the official's desire to block access to *State* review of his illegal policy. His fear is not of any intrusion on state sovereignty caused by the federal court order; rather, he fears the rights class members have under state law, rights created by the sovereign to review the official's action. This is a perversion of the Eleventh Amendment; it is an attempt to perpetuate the effects of prior willful illegal acts even though the State *qua* State has no interest in barring the requested relief. In this context, the official's attempt to align himself with the State and its sovereignty must fail. The State has no sovereign interest in barring the relief given; indeed, the remedies to which the class is remitted are those specifically agreed to and adopted by the sovereign State of Illinois for the purpose of ensuring that

(footnote continued from preceding page)

the official, and the State, with immunity from a federal court order for refund of taxes illegally exacted based on an improper assessment. The remaining question would then be - and the question in this case is - whether the official should have any immunity from being required to send a notice to the disadvantaged class of their still extant state rights to challenge the past assessment. The answer must be that the State has no presumptive interest, grounded in the Eleventh Amendment or sovereign immunity, in the official having immunity for the action. The State *qua* State must be presumed to have an interest in its citizens exercising those rights it has given them, and to have interests wholly at odds with an official attempting to interfere in derogation of both federal and state law. The Eleventh Amendment protects state fiscal interests, not illegal state official action.

each public aid recipient receives the benefits to which he or she is entitled. Ill. Rev. Stat., ch. 23, §§11-6 to 11-8.7 (1977).

Petitioner makes no attempt to demonstrate that it would be consistent with the purposes of the Eleventh Amendment to bar such relief. Instead petitioner merely asserts that if the Eleventh Amendment bars money damages against the State, as held in *Jordan I,* it bars notice relief against state officers, and no reasoned analysis is warranted. This contention is simply too facile.[15] It overlooks the historical and conceptual underpinnings of the Eleventh Amendment, and, if adopted, would result in a perversion of the Eleventh Amendment, "Our Federalism," and the congressional mandate embodied in 42 U.S.C. §1983 against illegal official action.

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[15]As recognized in Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 20 (1963),

> The question always has been which suits against officers will be allowed and which will not be. It early became clear that a suit against an officer was not forbidden simply because it raised a question as to the legality of his action as an agent of government or because it required him, as in mandamus, to prform an official duty. These as we know had been well established before the Eleventh Amendment as not necessarily requiring consent. To be sure the renewed emphasis on immunity given by the eleventh amendment might conceivably have been taken so to extend the doctrine as to exclude suits against state officers even in cases where the English tradition would have allowed them. There was a running battle as to where the line would be drawn. The amendment was appealed to as an argument for generous immunity. But there was the vastly powerful counterpressure for the enforcement of constitutional limits on the states. The upshot as we shall see was to confine the amendment's prohibition more or less to the occasion which gave it birth, to wit, the enforcement of contracts and to most (though not all) suits involving the title and disposition of a state's real and personal property.

B. The Principles of Federalism Are the Predominant Consideration in Determining the Scope of the Eleventh Amendment.

Last Term this Court reaffired the premise that it is the "principles of federalism that inform Eleventh Amendment doctrine . . . ." *Hutto v. Finney,* 46 U.S.L.W. 4817, 4820 (June 23, 1978). Similarly, in the past, this Court has recognized that decisions interpreting the Eleventh Amendment must be "in accord with the common sense of this Nation's federalism." *Parden v. Terminal Ry. Co.,* 377 U.S. 184, 196 (1964). While the currents of "Our Federalism"[16] have shifted over the last two hundred years,

[16]In *Younger v. Harris,* 401 U.S. 37, 44-45 (1971), this Court defined the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. *What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Government, and in which the National Government anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.* It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future. (emphasis added)

the underlying theme of federalism in Eleventh Amendment cases is pervasive.[17] In these cases, the Court has attempted to balance, accommodate, and harmonize the national government's interest in vindicating and protecting federal rights, federal interests, and the supremacy of federal law, with the state government's interest in preventing undue interference with the legitimate activities of the State.

The petitioner does not purport to explain how the notice relief undermines the principles of federalism, or what values of federalism compel the conclusion that "[t]he Eleventh Amendment is a jurisdictional bar to the exercise of a federal court's equitable power to order retrospective notice relief . . . ." Pet. Br. at 11. Instead, the petitioner contends that the test of Eleventh Amendment applicability is whether the relief is "prospective" or "retroactive." Pet. Br. at 26-32. First, neither the language of the Eleventh Amendment nor the intent of the framers supports such a test. Second, and most importantly, there are no principles of federalism that support such a test. Third, as discussed above, this Court has only held that "retroactive" money judgments are barred by the Eleventh Amendment; no other "retroactive" relief has been held to be barred by the Eleventh Amendment. Indeed, the line between "retroactive" and "prospective" relief, recognized in *Jordan I* to be elusive, was blurred in *Milliken v. Bradley,* 433 U.S. 267, 290 (1977), by this Court's approval of court-ordered state payments for compensatory education programs even

[17]*See generally,* Baker, *Federalism and the Eleventh Amendment,* 48 U. COLO. L. REV. 139, 172 (1977) ("Considerations of federalism seem to underlie all aspects of the eleventh amendment . . . Expressly recognizing the central role of federalism would undoubtedly clarify present law."); *LeClercq, State Immunity and Federal Judicial Power-Retreat from National Supremacy,* 27 U. FLA. L. REV. 361 (1975).

though such relief was designed to provide a remedy for the injury to those harmed in the past by the illegal acts of state officials. By analogy in this case, the notices are "part of a plan that operates *prospectively* to bring about the delayed benefits of a [constitutionally administered program]" (*Milliken,* 433 U.S. at 290) by notifying those harmed in the past of available state remedies. In short, the distinction between "retroactive" and "prospective" is flawed.[18]

[18]The differing interpetations of *Jordan I* by each of the members of the Third Circuit panel in *Fanty v. Commonwealth of Pa., Dept. of Public Welfare,* 551 F.2d 2 (3d Cir. 1977), *pet. for cert. pending sub nom. Randle v. Beal,* (No. 76-6853, 1977 Term), highlight the conceptual inadequacies of a prospective/retroactive test as framed by the petitioner. In this case, the trial court ordered state public aid officials to notify members of two subclasses of welfare recipients (a) that they had no legal obligation to continue to reimburse the State from federal disability benefits for welfare benefits already received, and (b) that they may have state administrative remedies to recover such payments already made. Whether such relief is permissible under the Eleventh Amendment divided the Third Circuit in three ways. Chief Judge Seitz interpreted *Jordan I* as establishing the test of "whether the relief operates against the sovereign itself or only against an officer" and, applying this standard, concluded the notice relief was barred by the Eleventh Amendment. *Id.* at 4. Judge Garth reasoned that the decree was in part designed to remedy a past breach of a legal duty and in part to prevent future violations and thus presented a borderline Eleventh Amendment issue. *Id.* at 6. In dissent, Circuit Judge James Hunter III disagreed that the notice relief looks solely to a "past breach of a legal duty" (*Id.* at 10) and thus concluded that the notice relief was a "necessary consequence of compliance in the future with a substantive federal question determination" (quoting *Jordan I* at 668) and therefore not barred by the Eleventh Amendment. Petitioner's reliance on the Third Circuit's holding in *Fanty* as "persuasive authority" (Pet. Br. at 39) is, to say the least, questionable. Moreover, since the notice relief in *Fanty* in part was necessary solely as a "prospective" remedy, *Fanty* underlines the additional question of whether, where notice is a part of prospective relief, the Eleventh Amendment bars a court from placing any statement about existing state remedies for past injury onto a notice which the federal court otherwise clearly has the power to order state officials to distribute.

Labeling relief "prospective" or "retroactive" neither frames the issue properly nor answers the issue. *See Turner v. Walsh,* 435 F. Supp. 707, 715 n.9 (W.D. Mo. 1977), *aff'd* 574 F.2d 456 (8th Cir. May 3, 1978). Furthermore, there is no cogent rationale why such a distinction, even if it could be made, should be decisive in interpreting the scope of the Eleventh Amendment.

To the petitioner any injunctive relief requiring state officials to take action in light of past illegality is "designed to *remedy* the denial" (Pet. Br. 26), and "essentially compensatory" (Pet. Br. 33), and therefore barred by the Eleventh Amendment. However, the cardinal principles of our legal system are predicated upon providing relief for past breaches of legal duties. Cases that are not "designed to *remedy* [past] denial" or be "essentially compensatory" are normally not ripe for adjudication. The contention that the Eleventh Amendment bars all relief against state officials that has any remedial effect on past action sweeps far beyond *Jordan I* and the intended purpose of the Eleventh Amendment.[19] Accordingly, respondents submit

[19]From another perspective, the federal courts have always been capable of not merely enjoining officials from future violations of the law, but affirmatively mandating state officials to provide revised or substitute procedures for persons previously injured. Where, for example, a person has been injured in the past by a legally deficient or non-existent state administrative hearing system, such as in a termination or suspension from employment, the courts have been free to affirmatively order state officials to give a hearing. *E.g., Perry v. Sindermann,* 408 U.S. 593, 603 (1972). So long as there is no federal monetary award and the State remains free to limit or deny monetary compensation in the federally-mandated but state-instituted procedure, the Eleventh Amendment is not implicated.

that while this Court has at times labeled certain relief "prospective" or "retroactive," these labels do not enlighten Eleventh Amendment analysis. A review of Eleventh Amendment cases points instead to a test that stresses considerations of federalism.

In the seminal Eleventh Amendment decision, *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 737 (1824), in which the plaintiff sued a state officer to recover a tax levied by the State of Ohio against the Bank of the United States, before ruling on the jurisdictional objections that the suit was against the State and therefore barred by the Eleventh Amendment, Chief Justice Marshall noted the need to

> pause for a moment and reflect on the relative situation of the Union with its members, should the objection prevail. A denial of jurisdiction . . . asserts that the agents of a state, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States.

Id. at 847. Recognizing the principles of federalism at stake, Chief Justie Marshall rejected the applicability of the Eleventh Amendment shield and held that a state officer could be sued in law and equity for wrongs done or threatened, when his acts were defended on the basis of official but constitutionally defective authorization.

After the Civil War, with the onset of civil rights jurisdiction as established in the various Civil Rights Acts, and also with the adoption of federal question jurisdiction in 1875, the question of the scope of Eleventh Amendment immunity was repeatedly addressed by the Supreme Court. In no case in which the Eleventh Amendment was held to be a bar, did the plaintiffs seek relief that was compatible with federalism or, in other words, in every case in which the Eleventh Amendment was held to be a bar, the relief sought

involved a significant intrusion into the legitimate activities, and particularly the fiscal activities, of the State. *See generally,* Liberman, *State Sovereign Immunity in Suits to Enforce Federal Rights,* 1977 WASH. U.L.Q. 195; Engdahl, *Immunity and Accountability for Positive Governmental Wrongs,* 44 U. COLO. L. REV. 1 (1972).

For example, in *Louisiana v. Jumel,* 107 U.S. 711 (1882), the plaintiffs were seeking to require the appropriation of certain funds for the payment of interest due on the bonds of the State of Louisiana which they held, as well as the collection of certain taxes and the application of the proceeds to the interest and principal of the bonds.

> The remedy sought, in order to be complete would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal, and interest were paid in full . . . . It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place.

Id. at 727-728. *Louisiana v. Jumel* constituted a turning point in Eleventh Amendment cases, and thereafter, in cases brought by holders of bonds seeking direct financial relief against the State, the Court repeatedly rejected their claims as barred by the Eleventh Amendment. *Hagood v. Southern,* 117 U.S. 52 (1886); *Ex Parte Ayers,* 123 U.S. 443 (1887); *Hans v. Louisiana,* 134 U.S. 1 (1890); *North Carolina v. Temple,* 134 U.S. 22 (1890).

Judicial interpretation of the Eleventh Amendment entered a new phase with the advent of the railroad rate cases, beginning in 1894 with *Reagan v. Farmers Loan & Trust Co.,* 154 U.S. 362 (1894), and culminating 14 years later with the landmark case of *Ex Parte Young,* 209 U.S.

123 (1908). In *Ex Parte Young* this Court held that the Eleventh Amendment did not bar a suit in federal court against a state Attorney General to enjoin him from enforcing an allegedly unconstitutional state statute establishing railroad rates.

> And again, it must be remembered that jurisdiction of this general character has, in fact, been exercised by Federal courts from the time of *Osborn v. The Bank of the United States* up to the present; the only difference in regard to the case of *Osborn* and the case at hand being that in this case the injury complained of is the threatened commencement of suits, civil or criminal, to enforce the act, instead of, as in the *Osborn* case, an actual and direct trespass upon or interference with tangible property. . . . The difference between an actual and direct interference with property and the enjoining of state officers from enforcing an unconstitutional act, is not of a radical nature, and does not extend, in truth, the jurisdiction of the courts over the subject matter. In the case of interference with property, the person enjoined is assuming to act in his capacity as an official of the state and justification for his interference is claimed by reason of his position as a state official. Such official cannot so justify when acting under an unconstitutional enactment of the legislature . . . . The sovereignty of the state is, in reality, no more involved in one case than in the other. The state cannot, in either case, impart to the official immunity from responsibility to the supreme authority of the United States.

Id. at 167.

The next significant group of Eleventh Amendment cases were those brought to recover taxes pursuant to state-created causes of action for refund of taxes illegally exacted. *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47 (1944); *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459 (1945); and *Kennecott Copper Corp. v. State Tax Commission,* 327 U.S. 573 (1946). These cases all involved the core concern of the Eleventh Amendment, protecting the State from a direct monetary liability imposed by the federal court. As stated in *Kennecott Copper Corp., supra*:

> These cases [*Ford Motor Company* and *Read*] declare the rule that clear declaration of a state's consent to suit against itself in the federal court on *fiscal claims* is required. The reason underlying the rule, which is discussed at length in the *Read* and *Ford Motor Co.* cases, is the right of a state to reserve for its courts the primary consideration and decision of its own tax litigation because of the direct impact of such litigation upon its finances.

Id. at 577. (emphasis added)

Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare, 411 U.S. 279 (1973), also fits squarely within the body of Eleventh Amendment cases in which plaintiffs were seeking a direct monetary judgment against a State. The plaintiffs, employees of state hospitals and other facilities, brought suit for a direct monetary judgment against the State for overtime pay under the Fair Labor Standards Act, 29 U.S.C. §216. In reviewing the legislative history of the FLSA, the Court found no congressional intent to deprive a State of its immunity from a suit in federal court seeking a direct judgment of monetary liability against the State. In reaching this conclusion, the Court noted: "We are reluctant to believe that Congress in pursuit of a *harmonious federalism* desired to treat the States so harshly." *Id.* at 286. (emphasis added)[20]

[20]The concurring opinion in *Employees of the Dept. of Public Health and Welfare v. Dept. of Public Health and Welfare,* 411 U.S. 279, 287 (1973) (Marshall and Stewart, JJ.), concluded, based on limitations inherent in Article III, that the plaintiffs could only enforce their federal rights in state courts, "a hypertechnicality that has long been understood to be a part of the tension inherent in our system of federalism." *Id.* at 298. This result is precisely what respondents here seek.

In summary, then, there is no case cited in the *Jordan I* decision, or in the petitioner's brief, in which the Eleventh Amendment has been held to be a bar to relief against state officers where the relief was not a significant intrusion upon the integrity of the state government as sovereign. Thus the critical question in determining whether a suit against a state officer is barred under the Eleventh Amendment turns on whether the relief respects the integrity and independence of state institutions; if so, the relief is not barred by the principles of sovereign immunity embodied in the Eleventh Amendment.

Moreover, to the extent that there are federal interests, such as federal institutions, funds, or programs, there is an added reason in our federal system for the federal courts to vindicate federal rights, but, as always, in a manner consistent with "Our Federalism." For example, in this particular case involving a cooperative federal/state grant-in-aid program, and federal funds, statutes and regulations, there are obviously important nationwide interests in insuring enforcement of federal law. *Jordan I,* 415 U.S. at 688-696 (Marshall and Blackmun, JJ., dissenting.) No such federal interests are presented in cases such as the tax cases of the 1940's or the bond cases in the latter part of the 19th century. This case, then, presents to the Court for the first time the question whether the Eleventh Amendment bars relief against state officers which (1) harmonizes the federal-state interests, (2) does not intrude upon state sovereignty, (3) reserves to the state courts the ultimate determination of liability, and (4) respects the state's institutions to determine matters of fiscal concern to the state.

Precisely such relief has already been approved by this Court in *Sterrett v. Grubb,* 400 U.S. 922 (1970), *aff'g mem.* 315 F. Supp. 990 (N.D. Ind. 1970). *Grubb* involved a class

action in which the court held that a statewide welfare regulation was contrary to the Social Security Act and therefore invalid under the Supremacy Clause. In connection with the claim of the members of the plaintiff class for restitution of benefits wrongfully denied, the court noted that federal law required all states participating in the AFDC program to provide for administrative appeals and hearings within the state public aid department, and to provide for corrective payments retroactive to the date the incorrect action was taken when an appeal was decided in favor of the claimant.[21] In view of these federal requirements, the Court remanded the claim for back benefits to the Indiana Department of Public Welfare in light of the court decision and the applicable regulations of the Department of Health, Education and Welfare. Further, the court required the members of the plaintiff class injured by the illegal state regulations to be notified they could appeal the denial of benefits.[22]

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[21]This mandatory provision is now found at 45 C.F.R. §205.10 (a)(18) (1977).

[22]It is also considered, ordered, adjudged and declared that the Indiana State Department of Public Welfare, its officers, employees and agents, shall, on or before 60 days of the date of this opinion, notify by first-class mail to his or her last known address, the named plaintiffs and all members of their class whose application for AFDC assistance has been denied or whose AFDC assistance has been terminated pursuant to Indiana's 'stepfather' regulation, MANUAL III-C-3, after August 8, 1968, and who was not at the time of such denial or termination determined to be otherwise ineligible for such assistance, that the "stepfather regulation" has been invalidated and that they may reapply for AFDC assistance. Such written notice must also inform these applicants and previous recipients that they may appeal at any time within 60 days of the date of such notice the denial or termination of AFDC assistance for the period during which it was denied, and such notice shall include a form returnable to the State department upon which such claimants may indicate their desire to appeal.

Grubb v. Sterrett, 315 F. Supp. 990, 996 (N.D. Ind. 1970).

Subsequent to this decision of the three-judge court, the state defendants moved to vacate the judgment and challenged, *inter alia,* the relief which they characterized as requiring lump sum retroactive payments. In rejecting this contention, the three-judge court stated:

> This court did *not* enter a money judgment against the State of Indiana. Rather, it remanded the claims of members of plaintiff class for retroactive payment of wrongfully withheld welfare assistance for determination by the Indiana DPW in accordance with its already-established procedures. This court did impose some specific additional requirements as to the *procedure* by which the Indiana DPW was to consider such appeals as may be taken. These procedural requirements were necessary under the facts and circumstances of this case in order to inform members of plaintiff's class of this decision and their rights and privileges thereunder. The imposition of these procedural requirements was within the broad remedial power of federal courts to grant supplemental relief which is necessary to give meaningful effect to their judgments and decrees. *See, e.g., Sullivan v. Little Hunting Park, Inc.,* 90 S. Ct. 400, 405 (1969).

Grubb v. Sterrett, Civ. No. 69 F 3, Memorandum and Order (N.D. Ind. June 8, 1970) (emphasis in original) (unpublished) (attached to brief of Plaintiffs-Appellees in the Seventh Circuit). The state defendants then appealed to this Court from both the original decision and the unpublished Memorandum and Order dated June 8, 1970. This Court summarily affirmed. 400 U.S. 922 (1970). This summary affirmance was left undisturbed by *Jordan I* and, understandably so, in light of the wholly different issues of federalism presented by the notice remedy approved in *Grubb,* in contrast to the direct money judgment against the

State disapproved in *Jordan I.*[23] See *Fitzpatrick v. Bitzer,* 427 U.S. 445, 458 (1976) (Stevens, J., concurring in the judgment). *See also Doe v. Gillman,* 479 F.2d 646 (8th Cir. 1973), *cert. denied,* 421 U.S. 920 (1975).[24]

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[23]Virtually the identical remedy approved in *Grubb* had already been affirmed by this Court in *Solman v. Shapiro,* 300 F. Supp. 409 (D. Conn. 1969), *aff'd mem,* 396 U.S. 5 (1969). In this class action, the trial court found provisions of Connecticut law regarding the income of stepfathers to be contrary to the federal requirements under the AFDC program and enjoined the continued enforcement of state law. In addition to injunctive relief, plaintiffs sought recovery of benefits wrongfully withheld pursuant to the voided state law. After noting that federal law required state public aid departments to make corrective payments, and that Connecticut law so provided, the court concluded:

> Since the state welfare agency has already established a procedure whereby retroactive damages for payments wrongfully withheld may be determined, the petitioner's prayer for damages is remanded to the Connecticut Department of Welfare for its determination in light of this decision and the applicable regulations of the United States Department of Health, Education and Welfare and Connecticut Department of Welfare. See *Robinson v. Washington,* 302 F. Supp. 842 (D.D.C., Nov. 18, 1968).

Solman v. Shapiro, 300 F. Supp. at 416.

[24]In *Doe* the district court had ordered the defendant Director of the Iowa Department of Public Aid to send notice to class members denied benefits for a two-year period preceding the date of the judgment that they were now eligible for benefits, and further ordering the defendant to make retroactive payments. *Doe v. Gillman,* 347 F. Supp. 483 (N.D. Iowa 1972). On appeal the defendants argued, *inter alia,* that the relief ordered by the trial court was barred by the state's Eleventh Amendment immunity from suit. In analyzing this Eleventh Amendment defense, the Eighth Circuit first noted that the Iowa Department of Public Aid regulations specifically required the payment of retroactive benefits in state administrative hearings. It then stated: "We can only assume that the defendants will follow their own regulations and retroactive payments will be made. See *Grubb v. Sterrett,* 315 F. Supp. 990, 995-996 (N.D. Ind. 1970), *aff'd* 400 U.S. 922." *Doe v. Gillman,* 479 F.2d at 649. On this basis, the Eighth Circuit concluded that it was unnecessary for the federal court either to decide the Eleventh Amendment issue or to

The notice relief upheld in *Sterrett v. Grubb, supra,* and subsequent to *Jordan I,* ordered in *Morris v. Houston,* G-250-73 C.A. (W.D. Mich. Oct. 18, 1974),[25] and *Herweg v. Ray,* No. 77-222-1, ____ F. Supp. ____ (S.D. Iowa July 10, 1978), and similarly approved by the Seventh Circuit *en banc,* shifts to the state administrative apparatus the burden of determining the rights, and liabilities, if any, of the parties. It preserves "the right of a state to reserve for its courts the primary consideration of its own . . . [monetary] litigation because of the direct impact of such litigation upon its finances." *Kennecott Copper Corp. v. State Tax Comm'n,* 327 U.S. 573, 577 (1946). There can be no doubt that this relief promotes the notions of cooperative federalism embodied in both the federal/state grant-in-aid program, and in the Eleventh Amendment.[26] The petitioner, however,

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order the defendants to pay back benefits and thus vacated the lower court decree so ordering. On the other hand, the provision in the district court decree requiring notice to all persons denied benefits for the two-year period prior to the decree was upheld. *Accord, Lewis v. Shulimson,* 534 F.2d 794 (8th Cir. 1976), *cert. denied* 430 U.S. 940 (1977) *pet. for reh. denied sub nom. Gourley v. Lewis,* 431 U.S. 934 (1977).

[25]In *Morris v. Houston,* G-250-73 C.A. (W.D. Mich. 1974) (R. Vol. IV, Item 36, Attachment), *rev'd on other grounds,* 516 F.2d 902 (6th Cir. 1975) (table), Chief Judge Fox interpreted *Jordan I* and the Eleventh Amendment as allowing notice relief to welfare recipients denied benefits in violation of federal law - "the duties of the state remain intact and enforceable by other means than direct injunctive order by a federal court for the payment of retroactive benefits." *Id.* at 15-16.

[26]Because the notice relief is not an award of damages, it is enforceable by means of the contempt power against the state officials to the extent - and only to the extent - that notice is not sent. Thus the problems alluded to in *Jordan I* in enforcing money judgments against the State are not presented by notice relief. *Alabama v. Pugh,* 46 U.S.L.W. 3802 (July 3, 1978). If the state officials refuse to make payments after losing either an administrative appeal or state court decision, they would not be in contempt of the federal court judgment. The only remedy of the respondents would be in the state courts.

simply ignores this reality. Cooperative federalism cannot mean that state welfare officials can knowingly violate federal welfare laws, and avoid any accountability to the needy persons injured by their actions.[27] By upholding the notice relief in this case, this Court harmonizes the interests of both State and National Governments and, at the same time, respects the principles of federalism embodied in the Eleventh Amendment. This interpretation of the Eleventh Amendment is identical to that reached in Jaffe, *Suits Against Governments and Officers: Sovereign Immunity,* 77 HARV. L. REV. 1, 28-29 (1963):

> It has been the burden of this article from the beginning that the so-called doctrine of sovereign immunity has never excluded judicial action simply because the enforcement of state policy was involved. . . . Where the enforcement of state policy threatens federal instrumentalities or federal programs or is in defiance of constitutional inhibitions (other than obligation of contract), *Osborn* and *Ex Parte Young* are the prototypes. One teaches that intervention does not

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[27]Personal liability of state officers is clearly not a realistic remedy for public aid recipients deprived of benefits to which they are entitled. First, federal funds available to states for corrective payments, 45 C.F.R. §205.10(b)(2) (1977), could not be used to satisfy a personal judgment against a state officer. Second, public aid officers are unlikely to be persons of sufficient means to make personal liability a viable remedy for the many needy persons who are affected by their decisions, and meeting the basic subsistence needs of the poor should not turn on the financial condition of state officers. Third, the immunity of public officers, although not absolute, is quite extensive since the range of their discretion is broad, and in few areas of welfare law will the test be satisfied whether they knew or should have known, that their actions were contrary to the Supremacy Clause. Even in the instant case, where the state officers knew that state regulations were contrary to federal law, the first two considerations unquestionably compel the conclusion that individual liability is not a sensible or realistic remedy for members of the plaintiff class.

violate the eleventh amendment; the other teaches that intervention may take effective forms even when it thereby imposes control on the higher centers of state officialdom.

This approach to Eleventh Amendment problems is also entirely consistent with *Jordan I.* Notice of the availability of possible relief through existing state administrative remedies, where the state agency, and state courts, would be the sole arbiters of whether any monetary relief would be granted, respects the limited role of federal courts in our system, and at the same time provides remedies for violations of federal law and thereby insures governmental accountability. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs,* 44 U. COLO. L. REV. 1, 55, 59-60 (1972).

Finally, this interpretation of the Eleventh Amendment is consistent with the federal court's historic equitable role in tailoring and providing relief for violations of federal law. Petitioner makes repeated references to the fact that the members of the plaintiff class were injured years ago and any recovery by them in a state administrative hearing will not necessarily relate to present need for benefits. (Pet. Br. at 25, 29, 34) This argument confuses equitable jurisprudence with Eleventh Amendment jurisprudence. LeClercq, *State Immunity and Federal Judicial Power - Retreat from National Supremacy,* 27 U. FLA. L. REV. 361, 373 (1975). Respondents concede that there will be cases in which public aid officials are found to have violated provisions of the Social Security Act, but federal courts in the exercise of their equitable discretion will decline to require notices. *See, e.g., Owens v. Roberts,* 377 F. Supp. 45, 60-61 (M.D. Fla. 1974) (Per Curiam Decision on Motion to Amend Judgment); *cf., City of Los Angeles v. Manhart,* 98 S. Ct. 1370 (1978). In this case, however, petitioner did not present any equitable

defenses in the courts below, and has only presented to this Court the Eleventh Amendment jurisdictional issue. Moreover, in view of the intentional violations of federal law in this case, the equities certainly tip in favor of the respondents, and providing equitable relief is in furtherance of the federal court's obligations under Section 1983 to provide redress for individuals whose federal rights are violated.

III.

THE NOTICE RELIEF FULFILLS THE COURT'S DUTY, UNDER SECTION 1 OF THE CIVIL RIGHTS ACT OF 1871, TO VINDICATE FEDERALLY SECURED RIGHTS WITHOUT UNREASONABLY INTRUDING UPON STATE SOVEREIGNTY.

No interpretation of the Eleventh Amendment, and the principles of federalism "that inform Eleventh Amendment doctrine" (*Hutto v. Finney,* 46 U.S.L.W. 4817, 4820 (June 23, 1978)) may be made in this case without also taking into account the principles of federalism embodied in Section 1 of the Civil Rights Act of 1871, now codified at 42 U.S.C. §1983. For this provision was enacted by Congress to provide an effective federal remedy for infringement of federal rights by state officers, exactly as occurred in this case. The notice relief approved by the court below fulfills the purpose of Section 1983 by vindicating the federal rights of the respondents. At the same time such relief harmonizes considerations of federalism and comity by respecting the petitioner's legitimate sphere of independence in the administration of Illinois' public assistance programs. To reverse the court of

appeals in this case in deference to petitioner's ill-defined and distorted notions of federalism and state sovereignty would emasculate the remedial purposes of Section 1983.

A. Petitioner's Intentional Violation of Federal Law Falls Squarely Within the Ambit of Section 1983.

Beginning with its decision in *King v. Smith*, 392 U.S. 309 (1968), this Court has consistently recognized that Congress, by statute, and HEW, by regulations, have conferred upon the recipients of federal-state categorical assistance programs certain guarantees.[28] The Court has repeatedly held that state welfare officials may not subvert these protections without running afoul of the superior position federal law has been accorded by the Supremacy Clause of the Constitution, Art. VI, cl. 2. *Van Lare v. Hurley*, 421 U.S. 338 (1975); *Shea v. Vialpando*, 416 U.S. 251 (1974); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968).

Prior to the time this lawsuit was filed, the director of the Illinois Department of Public Aid knew full well that federal law required him to act upon respondents' AABD applications within specified time periods, and that benefits to eligible applicants were to be effective as of the last day of the relevant time limit. (A. 37a-39a) "[W]ilfully and in gross disregard of the rights of eligible AABD applicants" (A. 38a), he enforced his own illegal regulations, which had already been held "null and void" by a three-judge federal

[28] *See generally* M. REAGAN, THE NEW FEDERALISM, 54-97 (1972).

court. *Rodriguez v. Swank*, 318 F. Supp. 289 (N.D. Ill. 1970) (Judgment entered October 1970, ¶7) (R. Vol. I, Item 9, Exh. B).

Relying upon its earlier decision in *Rosado v. Wyman*, 397 U.S. 397 (1970), this Court held in *Jordan I* that respondents had properly invoked §1983 as a basis for obtaining relief against petitioners' enforcement of state regulations which directly contravened the requirements of the Social Security Act. 415 U.S. at 675.[29]

The relief developed by the courts below is also consistent with the purposes of §1983, when viewed in light of the legislative history surrounding the enactment of §1983 as set out by this Court in *Monroe v. Pape*, 365 U.S. 167 (1961), and *Monell v. Department of Social Services*, 98 S. Ct. 2018 (1978).

Enacted as §1 of the Civil Rights Act of 1871, Ch. 22, §1, 17 Stat. 13, §1983 by its terms protects a "party injured" against any "person who, under color of any statute . . . [or] regulation of any State" infringes upon "any rights, privileges, or immunities secured by the Constitution and laws," and provides for relief in the federal courts to the party injured "in any action at law, suit in equity, or other

[29] In this case, petitioner deprived respondents of a right which this Court has deemed to be "basically constitutional in nature, deriving its force from the operation of the Supremacy Clause, Article VI, cl. 2...." *Douglas v. Seacoast Products Inc.*, 431 U.S. 265, 272 (1977); *see also Hagans v. Lavine*, 415 U.S. 528, 549 (1974); *Perez v. Campbell*, 402 U.S. 637, 644 (1971). However, even if viewed solely as a violation of the Social Security act, respondents' action lies squarely within §1983's protection of rights secured by federal law, a dimension of the statute added in 1874. See *Flagg Bros., Inc. v. Brooks*, 98 S. Ct. 1729 (1978); *Mitchum v. Foster*, 407 U.S. 225, 239 n.30 (1972); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n.7, 548 n.15, 549 n.16; *City of Greenwood v. Peacock*, 384 U.S. 808, 829-30 (1966).

proper proceeding for redress." This legislation and the other Reconstruction legislation marked a sharp departure from the manner in which this country had previously viewed the task of enforcing the civil rights of its citizenry.[30] The systematic infringement of federal rights by state officials prompted the Congress to provide for remedies in the federal courts to insure the supremacy of federal law, its enforcement, and its protections.[31] *See Mitchum v. Foster,* 407 U.S. 225, 238-239 (1972).

Section 1983 was a key element in this expansion of federal power. Its purpose was to combat the refusal or

[30]Prior to the Civil War and Reconstruction, state governments were accorded a position of preeminence in the economic and political life of the nation. Control over the definition and enforcement of civil and other rights was retained by the states and state officials as part of their responsibility to exercise "police powers" to preserve the health, welfare and safety of the people. The national government was viewed as the repository of limited powers conferred upon it by a consensus of the states. *See Developments in the Law - Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1138-1141 (1977) (hereinafter "*Developments*"); H. HYMAN, A MORE PERFECT UNION, 7-10 (1973); W. BENNETT, AMERICAN THEORIES OF FEDERALISM 91-159 (1964). The Civil War and the turbulent period of recalcitrance on the part of the South which followed, however, led to a reordering of the pre-War allocation of federal-state responsibility. Moreover, numerous federal statutes were passed to further promote and ensure the transition of black men and women from slaves to whole members of society. For example, the Freedman's Bureau Acts of 1865 and 1866, Ch. 90, § §1-5, 13 Stat. 507, and Ch. 200, § §1-15, 14 Stat. 173, much like present-day public assistance programs, sought to secure a minimum level of employment, health care and education for the disadvantaged black citizens of the nation. M. KONVITZ, A CENTURY OF CIVIL RIGHTS, 43-47.

[31]This machinery included the enactment of the various civil rights statutes, the expansion of federal removal and habeas corpus authority, and the establishment of federal question jurisdiction. *See Developments, supra* n.30 at 1147-1149; Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1876,* 13 AM. J.L. HIST. 333 (1969).

inability of state officials and the state courts to enforce federal rights by "open[ing] the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Id.* at 239; *see Monell v. Department of Social Services* 98 S. Ct. 2018, 2032-2035 (1978); *Steffel v. Thompson,* 415 U.S. 452, 453-473 (1974); *McNeese v. Board of Education,* 373 U.S. 668, 671-672 (1963); *Monroe v. Pape,* 365 U.S. 167, 172-187 (1961). "[M]oreover, there can be no doubt that §1 of the Civil Rights Act was intended to provide *a remedy, to be broadly construed,* against all forms of official violation of federally-protected rights." *Monell,* 98 S. Ct. at 2041 (emphasis added).[32] The director of the Illinois Department of Public Aid in the present case nevertheless claims that he may use the Eleventh Amendment to provide a constitutional bar to the very remedies Congress intended federal courts to provide in Section 1983 cases.

[32]A broad construction of the Act is mandated by its legislative history. In the words of Representative Shellabarger, the author of the legislation and its manager in the House of Representatives:

> This act is remedial and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people . . . Chief Justice Jay and also Story say:
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> > "Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally...." 1 *Story on Constitution,* sec. 429.

CONG. GLOBE, 42d Cong., 1st Sess., App. at 68 (1871), as quoted in *Monell,* 98 S. Ct. at 2032-2033.

Petitioner's position could not be more directly at odds with the intent of the Congress that enacted §1983. As this Court only last Term observed, after reviewing the extensive legislative history of the Act, "everyone [in Congress]—proponents and opponents alike—knew §1983 would be applied to state officers and nonetheless stated that §1983 was constitutional . . ." *Monell,* 98 S. Ct. at 2041. That Congress intended the federal courts to tailor relief so as to redress the deprivation of federal rights is indicated by the contrast between the sweeping language relating to remedies found in Section 1 of the Civil Rights Act of 1871 and the language found in Sections 2 and 6 of the Act expressly limiting relief to damages.[33] As stated in *Monroe v. Pape*, 365 U.S. 167, 178 (1961), "It was precisely that breadth of the remedy which the opposition emphasized." Such remedy would be utilized (1) to override state laws, (2) to provide a remedy where state law was inadequate, and (3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice" (*Id.* at 174), the later being the precise situation now before the Court.

Petitioner relies (Pet. Br. 26) heavily on the dictum in *Jordan I* that while "a §1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, *Ex*

[33] "As to the civil remedies for a violation of these privileges . . . the injured party should have an original action in our Federal courts so that by *injunction* or by the recovery of damages he could have relief . . . ." CONG. GLOBE, 42d Cong., 1st Sess. at 501 (Frelinghuysen) (emphasis added).

Parte Young . . . ." 415 U.S. at 677. While the original injunction in *Ex Parte Young* involved "prospective" injunctive relief, nothing in that opinion suggests that the federal court's remedial power, consistent with the Eleventh Amendment, is "*necessarily*" so limited. Moreover, there is no discussion in *Ex Parte Young* of the policies embodied in Section 1983. Further, there is certainly no support either in the language or the legislative history of §1983 to support a prospective/retroactive distinction in regard to relief against state officers. Both the language and the legislative history point to the conclusion that Congress intended to provide the federal courts with broad discretion to tailor remedies against state officers to redress the deprivation of federal rights. Not once in all of the discussions surrounding the enactment of the 1871 Civil Rights Act did any Congressman or Senator suggest that the Eleventh Amendment or state sovereignty generally would operate to restrict the remedy under §1983 against state officers. The absence of such an objection is significant. For the Congress of 1871 certainly was sensitive to the constitutional implications of the bill it was considering, and particularly the extent to which the Act would impinge upon the notion of sovereignty which underlies the independence of state government.[34]

The congressional debates concerning §1983 reveal that the Congress of 1871 did not consider a state officer's actions to be an expression of state sovereignty, deserving of protection, where the officer, like the director of public aid in the present case, violated federal law and the

[34] *See Monell v. Department of Social Services*, 98 S. Ct. 2018, 2031 (1978).

Supremacy Clause,[35] and, in doing so, also transgressed the requirements of state law pertaining to the administration of his office. Obviously, such a course of conduct is as offensive to the sovereignty of the State as it is to the federally secured rights which are violated. In fact, the history of the Civil Rights Act demonstrates that the principal aim of Congress in enacting §1983 was to curb exactly this kind of abuse of authority by state officials. *Monroe v. Pape,* 365 U.S. at 174.

With this historical background, Congress could not have intended to permit state officers to raise the shield of the Eleventh Amendment to deny a remedy to persons whose federal rights were violated except in those few cases where the relief was a substantial and unwarranted intrusion upon the sovereignty of the State.[36] *Cf. Zwickler v. Koota*, 389

[35]A State office must be assumed with such limitations and burdens, such duties and obligations, as the Constitution of the United States attaches to it. The General Government cannot punish the State, but the officer who violates his official constitutional duty can be punished under Federal law. What more appropriate legislation for enforcing a constitutional prohibition upon a State than to compel State officers to observe it? Its violation by the State can only be consummated through the officers by whom it acts.

CONG. GLOBE, 42d Cong., 1st Sess. App. at 314 (1871) (Burchard)

We must remember that it was States' rights, perverted I admit from their true significance, that arrayed themselves against the nation and threatened its existence . . . . Federal laws and federal rights must be protected whether domestic laws are interfered with or not, because the Constitution and the laws made in pursuance thereof are the supreme law of the land.

CONG. GLOBE, 42d Cong., 1st Sess. at 502 (Frelinghuysen).

[36]As noted in *Steffel v. Thompson*, 415 U.S. 452, 464 n.13 (1974):

"Sensitiveness to 'states' rights,' fear of rivalry with state courts and respect for state sentiment were swept aside by the great impulse of national feeling born of the Civil War. Nationalism was triumphant; in national administration was sought its vindication. The new exertions of federal power were no longer entrusted to the enforcement of state agencies." F. Frankfurter and J. Landis, The Business of the Supreme Court 64 (1928).

U.S. 241 (1967); *Mitchum v. Foster*, 407 U.S. 225 (1972). Certainly the burden must fall on the state officer to establish (1) a substantial justification why his actions should be *pro tanto* the State's and, therefore, sheltered by its immunity, (2) that it would be consistent with the congressional intent in enacting §1983 for the state officer to invoke the State's sovereignty, and (3) how the relief sought is antagonistic to the sovereign immunity principles embodied in the Eleventh Amendment. In *Jordan I*, this Court held that the state officers satisfied that burden because money damages against the State were unquestionably the central concern of the framers of the Eleventh Amendment and such relief strikes at the heart of the sovereign's independence. The petitioner here never satisifes this burden nor explains how his position comports with the principles of §1983, the Eleventh Amendment, or the interests of the state or federal sovereigns.

The notice relief presently before the Court, however, falls within the core of the relief which Congress intended federal courts to provide against state officers, and in no way can the notice relief be construed as antagonistic to the intent of the framers of the Eleventh Amendment or antagonistic to the principles of the sovereign's immunity. Just as the original violation of federal law in this case was caused by an individual state officer, without the imprimatur of the state legislature or the State, the relief is directed at an individual state officer, and not at the State.[37]

[37]In light of the fact that the relief approved by the court of appeals *en banc* is directed at state officers, not at the State, it is unnecessary in this case to confront directly the far-reaching question of whether Congress intended in §1983 to provide for relief directly against States, as it did against municipalities. *Compare Monell v. Department of Social Services*, 98 S. Ct. 2018 (1978). On the question of whether "person" as used in Section 1983, included States, as "bodies politic" (Act of Feb.

The judicial decree, as modified by the court of appeals, to send notices to members of the plaintiff class merely requires the state officer to fulfill his ordinary duties under federal and state law to public aid recipients in cases of reduction of assistance. If the state officer were to refuse to send such notices, the order may be enforced by the usual contempt powers of the court directed at the state officers, not at the State. *Alabama v. Pugh*, 46 U.S.L.W. 3802 (July 3, 1978). Such enforcement, if necessary, would not result in a clash between the sovereign State of Illinois and the federal court.

The record in the present case, therefore, presents exactly the type of conduct that most directly prompted enactment of §1983. Federal law concerning the processing and initial payment of AABD benefits was unambiguous. The State, in its sovereign capacity, required those administering its public assistance programs, including AABD, to adhere to federal requirements with respect to decisions on applications for assistance. Yet petitioner, "by reason of prejudice, passion, neglect, intolerance or otherwise," (*Monroe*, 365 U.S. at 180) enforced his own regulations, which operated to reduce the amount of assistance received by respondents, in direct violation of the property rights conferred upon them by the

25, 1871, ch. 71, §2, 16 Stat. 43), see *Munn v. Illinois*, 94 U.S. 113, 124-26 (1876); *Keith v. Clark*, 97 U.S. 454, 459-461 (1878); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 475-76 (1857) (Grier, J., concurring). In examining the legislative history of §1983, it would be unreasonable to insist upon express legislative intent to override Eleventh Amendment State immunity since it was not until 1890, some nineteen years later, that this Court extended the State's Eleventh Amendment immunity to suits brought in federal courts by citizens against their own States. *Hans v. Louisiana*, 134 U.S. 1 (1890).

Social Security Act. *See Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). The lower court's injunction requiring petitioner to afford respondents the notice to which they are entitled under both federal and state law is exactly the kind of relief which fulfills the policies and purposes behind §1983, and is consistent with this nation's federalism.

B. Once Having Found a Violation of Federal Law, the District Court Had a Duty Under Section 1983 to Fashion Relief Which Vindicated Respondents' Federal Rights, Without Unnecessarily Intruding upon State Sovereignty.

This Court has consistently held that where a plaintiff demonstates that his or her federal rights have been violated, the federal courts have a duty to shape relief which will provide the plaintiff with a remedy for the wrong done. *Hills v. Gautreaux*, 425 U.S. 284 (1976); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Brown v. Board of Education*, 349 U.S. 294 (1955).[38] This duty necessarily follows from the "paramount role Congress has assigned to the federal courts to protect constitutional rights," *Steffel v. Thompson*, 415 U.S. 452, 473 (1974); *see Hicks v. Miranda*, 422 U.S. 332, 353 (1975) (Stewart, J., dissenting). The manner in which relief is formulated has, in

[38]This is a principle which has remained constant throughout our constitutional history. *See Bell v. Hood*, 327 U.S. 678, 684 (1946): "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (citing, *inter alia*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).)

large part, been left to the creative discretion of the lower courts — equitable remedies being "a special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman,* 411 U.S. 192, 200 (1973). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad." *Swann,* 402 U.S. at 15; see also *Hutto v. Finney,* 46 U.S.L.W. 4817, 4819, n.8 (June 23, 1978).

The equitable powers of the federal courts, however, are not without limits in suits against state officers. Perhaps the most important restriction stems from the concept of federalism and its recognition of the dual sovereignty upon which our system of government is premised. Particularly since its decision in *Younger v. Harris,* 401 U.S. 37 (1971), this Court has emphasized that in fashioning remedies to vindicate federal rights, the federal courts must not ignore the constitutional significance of independent state government, nor may they frustate the States' ability to function within their legitimate spheres of authority. In *Younger,* the Court stressed the need to maintain

> a system in which there is sensitivity to the legitimte interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44. Although it is often difficult to delineate the bounds of legitimate state activity, the Court's decision in *Younger* and its progeny makes clear that its basic concern has been to harmonize the state government's interest in remaining free from unnecessary and unwarranted federal intrusion and the national government's interest in insuring the

protection of federal rights.

Although *Younger* and its progeny are concerned with the threshold problem of whether federal issues are to be litigated in state or federal court, this Court has held that the interests of comity and federalism which underlie *Younger* are also to play a critical role in the formulation of relief, consistent with the Eleventh Amendment, in a case such as this which is properly brought in the federal court. *Hutto v. Finney,* 46 U.S.L.W. 4817 (June 23, 1978); *Milliken v. Bradley,* 433 U.S. 267 (1977).[39] In *Milliken,* the Court established a three-pronged standard against which equitable relief fashioned in the context of §1983 litigation is to be measured.

> In the first place, . . . the nature of the . . . remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to 'the condition alleged to offend the Constitution . . .'. Second, the decree must indeed be *remedial* in nature, that is, it must be *designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct'.* Third, the federal courts in devising a remedy must *take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.*

Id. at 280-281 (citations omitted; emphasis added).

[39]Indeed, a number of commentators have convincingly argued that the reconciliation of federal and state authority, in the context of federal question litigation, can be more effectively accomplished in the selection of an appropriate remedy, rather than at the threshold stage of forum-selection, as is mandated by *Younger. See* Weinberg, *The New Judicial Federalism,* 29 STAN. L. REV. 1191 (1977); *Developments, supra,* n.30 at 1175-1190; Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies,* 30 STAN. L. REV. 661, 706-23 (1978).

The task of devising relief which satisfies each of the three tests set out in *Milliken* — thereby vindicating federal rights that have been compromised by state officials, while at the same time accommodating the sovereignty of the State and according its officers the latitude necessary "to perform their separate functions in their separate ways," (*Younger v. Harris*, 401 U.S. at 44) is a difficult one. It has been termed "the central paradox of our judicial federalism."[40] Nonetheless, the respondent submit that the notice relief fashioned by the district court, as modified by the court of appeals, is exactly the kind of creative and effective remedy, which accomodates the competing interests of our federal system, and which is sensitive to "the legitimate interests of both State and National Governments . . .," *Younger,* 401 U.S. at 44; *see Hicks v. Miranda,* 422 U.S. 332, 353 (1975) (Stewart, J., dissenting). Such notice relief is a carefully tailored remedy which neither collides with principles of sovereign immunity or federalism embodied in the Eleventh Amendment nor leaves class members whose rights have been violated in the dark about a possible state remedy.

Moreover, the notice relief comports with each of the three factors enumerated in *Milliken, supra,* to be considered in fashioning equitable relief designed to vindicate federal rights. First, the remedy corresponds to the nature of the violation, inasmuch as it seeks to address the actual harm caused by petitioner's unlawful conduct, *i.e.*, the deprivation of benefits due respondents. Second, the notice relief is aimed at accomplishing "the ultimate

[40]Weinbert, *supra* n.39 at 1025.

objective of the remedy [which] is to make whole the victims of unlawful conduct," *Id.* at 280 n.15. Each class member who has been denied benefits will be placed on a par with every other public aid recipient in Illinois by being potentially able to recover those benefits through the state's "fair hearing" procedures, unless he or she individually is subject to a defense. Such a process, given the constraints of the Eleventh Amendment, fulfills to the maximum extent possible this Court's mandate that, "where a legal injury is of an economic character, the 'general rule is that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury.' " *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), quoting *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867). Third, principles of federalism will be preserved because the State of Illinois, and not the federal courts, will determine who, if anyone, is entitled to back benefits. The decisions will be made pursuant to the State's own procedures and regulations.

The relief approved by the court of appeals, *en banc,* in this case is unquestionably far less sweeping and less intrusive than that in *Milliken.* Notwithstanding the Eleventh Amendment, *Milliken* approved specific expenditures which would, *inter alia,* compensate injured plaintiff class members for "a past breach of a legal duty on the part of the defendant state officials." *Jordan I* at 668. Had the district court in that case also ordered the state officials to send notices to the members of the plaintiff class advising them to seek the assistance, if they so desired, of state officials in securing the available remedies, i.e., the compensatory programs, no principled basis would support a holding that the Eleventh Amendment barred such

relief.[41] Yet that is the petitioner's claim here: that the Eleventh Amendment bars the federal court from notifying injured persons of remedies available to them for redress of their injuries.

In the absence of the notice relief at issue, the federal court would leave totally unredressed the harm created by the loss of benefits resulting from petitioner's policies. As a result, the remedy would not comprehend the entire "scope of the constitutional violation," (*Milliken,* 433 U.S. at 280) nor would the relief in any sense be "*remedial* in nature." *Id.* at 280. In fact, absent the notice relief, the members of the class actually harmed by the petitioner's action would receive no relief whatsoever. Moreover, the state's preexisting regulatory scheme, created for the very purpose of ferreting out and correcting the underpayment of benefits to eligible recipients, as described *supra* at pp. 16-19, would be ignored by the decree as it stood after *Jordan I.*

The decree does not place the federal courts in the position of requiring the payment of any money out of the state treasury, but instead the notice relief is ancillary to the declaratory and injunctive relief already approved in *Jordan I. See Hutto v. Finney,* 46 U.S.L.W. 4817, 4820

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[41] *Cf. United States v. Texas,* 447 F.2d 441 (5th Cir. 1971), *stay denied sub nom. Edgar v. United States,* 404 U.S. 1206 (Black, Circuit Justice, 1971), upholding relief requiring the defendants to distribute a bulletin "designed to notify faculty, staff and patrons of local school districts of the availability of complaint and grievance procedures and to inform them of how to utilize these procedures." *Id.* at 448. The Fifth Circuit also, however, vacated a provision for state officials mandating local school boards to provide back pay, "with the provision that the Order shall not be construed to have any effect upon the state or federal remedies of Faculty or Staff for discriminatory action . . . ." *Id.* at 442.

(June 23, 1978). The injunction entered merely guarantees that the administrative strucure created by the State prior to the initiation of this litigation, will be utilized to fulfill the adjudicatory purposes for which it is intended. No remedy could better preserve the sovereign position of the State of Illinois.

This Court has reiterated time and again that "state and local authorities have primary responsibility for curing constitutional violations." *Hutto v. Finney,* 46 U.S.L.W. 4817, 4819 n.9 (June 23, 1978); *see Milliken,* 433 U.S. at 281; *Brown v. Board of Education,* 349 U.S. 294, 299 (1955). Although, as discussed in Section IB *supra* p. 16, the state courts were not available as a forum for adjudicating the threshold question of whether petitioner's regulations and practices with respect to AABD applications were contrary to federal law, the State of Illinois has established an administrative forum designed specifically to permit corrective action. This preexisting administrative enforcement mechanism is an integral part of a relatively complex federal-state regulatory system, which operates to protect the State's strong and legitimate interest in maintaining the fiscal and administrative integrity of its public assistance programs and, at the same time, to "secure for every applicant and recipient the aid and services to which he may be entitled," Ill. Rev. Stat., ch. 23, §11-2 (1977).

"The concept of federalism requires 'sensitivity to the legitimate interests of *both* State and National governments,' " *Hicks v. Miranda,* 422 U.S. 332, 356-357 (Stewart, J., dissenting, quoting from *Younger v. Harris,* 401 U.S. at 44) (emphasis in original), and requires the affirmance of the notice relief approved by the court below. To hold that the Eleventh Amendment bars such relief

would result in a perversion of the Eleventh Amendment "Our Federalism," and the congressional mandate embodied in Section 1983.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the court of appeals.

Respectfully submitted,

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